(1)

91-239

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CHARLES F. PATTERSON,

Petitioner

versus

AMY S. BOLAND

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, GREENE COUNTY

PETITION FOR WRIT OF CERTIORARI

CHARLES PATTERSON
Petitioner, pro se
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(1)

QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner's constitutional right to trial by jury unlawfully violated when the trial court sustained Respondent's motion for summary judgment, and the Court of Appeals of Greene County, Ohio, affirmed the trial court's (summary) judgment, despite the facts that:

(a) Petitioner had lawfully demanded a trial by jury in his Complaint,

(b) the value in controversy exceeded twenty dollars,

(c) Petitioner's brief opposing summary judgment provided evidence that there were genuine issues of material fact, and

(d) Respondent had not answered many of Petitioner's very long standing interrogatories and request for admissions, even though under a long standing court order to do so?

2. Does Petitioner have a constitutional right to trial by jury in this case, which is a legal malpractice case, wherein the underlying case was a divorce case in Ohio in which there is no right to trial by jury despite the fact that property of value far in excess of twenty dollars was in controversy?

3. Is it constitutional for the state of Ohio, via Ohio Civil Rule 75(C), to deny parties the right to trial by jury in divorce cases in which property valued at more than twenty dollars is in controversy?

4. Is it a violation of Petitioner's constitutional right to trial by jury, for the trial court to require Petitioner, a pro se plaintiff in a legal malpractice case, to obtain legal expert testimony at trial in order to preclude a directed verdict and insure that the case will go

to the jury on all issues of material fact?

5.. If the answer to the above question (question four) is no, would it be constitutional for Petitioner, a pro se plaintiff in a legal malpractice case, to subpoena Respondent for trial and require Respondent to testify as Petitioner's legal expert at trial, with Petitioner being allowed to cross-examine Respondent, and rebut the testimony of Respondent, relevant to the issues determined by the court to require pro se plaintiff to introduce legal expert testimony on, in order for the case to go to the jury on all issues of material fact?

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TABLE OF AUTHORITIES

REPORTS OF OPINIONS DELIVERED IN THIS CASE

The only opinion delivered in this case, an unreported opinion, was rendered on December 28, 1990, by the Court of Appeals of Greene County, Ohio, in CASE NO. 90-CA-44.

GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE U.S. IS INVOKED

Dates of Key Entries in this Case

March 20, 1990 is the date of the Journal Entry of the Court of Common Pleas, Greene County, Ohio, that awarded Respondent a summary judgment in Case No. 88-CV-0406.

January 22, 1991 is the date of the Final Entry of the Court of Appeals of Greene County, Ohio, persuant to the opinion rendered in CASE NO. 90-CA-44.

May 15, 1991 is the date of the Entry of The Supreme Court of Ohio, in Case No. 91-400, that overruled Petitioner's Memorandum in Support of Jurisdiction.

Statutory Provisions Conferring United States Supreme Court Jurisdiction

The above mentioned court actions violated

Amendment VII and Article VI of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND CIVIL RULES INVOLVED IN THIS CASE

United States Constitution, Amendment VII

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

United States Constitution, Article VI [2]

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Civil Rules 37(B), 56(C), 56(G), 75(A), and 75(C) of the Ohio Rules of Civil Procedure

The pertinent portions of the Ohio Civil Rules are set forth in the appendix.

STATEMENT OF THE CASE

On October 18, 1988, Petitioner, acting pro se, filed a negligence Complaint (a legal malpractice suit) against Respondent, Amy S. Boland, an attorney who had represented Petitioner during the following segments of a divorce case: part of Case No. 86 DR 519 (in the Court of Common Pleas of Greene County, Ohio); all of Case No. 87 CA 0044 (in the Court of Appeals of Greene County, Ohio); and all of Case No. 88-691 (in the Supreme Court of Ohio). In said Complaint, Petitioner charged that Respondent was negligent in performing many duties owed to Petitioner, including: failure to address some very serious deficiencies of the trial court in briefs (she prepared on behalf of Petitioner) in both the Court of Appeals and the Supreme Court

of Ohio; failure to address some very serious deficiencies of the Court of Appeals in a brief to the Supreme Court of Ohio; and failure to do other things. One "other thing" charged was the failure of Respondent to inform Petitioner about the one year limitation on filing a legal malpractice suit until the year had expired, even though Respondent knew that Petitioner was expecting Respondent to handle a legal malpractice suit against attorney John Huber. Said Complaint listed several of John Huber's serious failures while representing Petitioner, prior to the time that Respondent represented Petitioner, in said divorce case. Said Complaint demanded a judgment against Respondent of $50,000 and costs. Petitioner lawfully demanded a trial by jury for all issues in said Complaint. On November 17, 1988, Respondent filed her Answer.

On January 3, 1989, Petitioner filed his interrogatories to Respondent. On Feb-

ruary 2, 1989, Respondent filed her answers and objections. Many of Respondent's answers were evasive or incomplete, and her objections were not well-founded.

On February 14, 1989, Petitioner filed a motion for an order compelling answers and voiding defenses (because Petitioner's interrogatories addressing three of the defenses Respondent had raised were neither answered or objected to, Petitioner moved the court to void these defenses). Respondent did not file an opposing brief.

On April 24, 1989, Petitioner filed his request for admissions to Respondent. On May 26, 1989, Respondent filed her answers and objections. Respondent's objections were not well-founded.

On June 27, 1989, Petitioner filed a "motion for order compelling answers to plaintiff's request for admissions, and a special reminder to the court." The special reminder was that Petitioner was due a ruling on his prior motion to compel an-

swers and void defenses. Respondent did not file an opposing brief.

On September 25, 1989, the trial court held a conference. On October 3, 1989, the trial court filed a Journal Entry which:

(a) ordered Respondent to answer Petitioner's interrogatories and Petitioner's requests for admission;

(b) authorized each party to file a motion for summary judgment;

(c) authorized Respondent to file a motion about the right of jury trial; and

(d) declined to strike any defenses raised by Respondent.

On November 17, 1989, Petitioner filed a motion for the trial court to order all possible sanctions because Respondent had failed to comply with the trial court's order to answer Petitioner's interrogatories and request for admissions. Respondent did not file an opposing brief.

On November 27, 1989, Respondent filed a motion for summary judgment. Respondent

argued that "Plaintiff is unable to provide expert testimony necessary to support a malpractice action." Respondent's motion for summary judgment included only one thing that might be considered evidence--an affidavit of Respondent herself in which she stated, in part, that "the legal services rendered to him (Petitioner) by me were done so in a diligent, careful and prudent manner and in such a manner which conformed to the highest degree of legal care and professionalism."

On November 28, 1989, Respondent filed a brief that opposed Petitioner's "request" for a jury trial. In her brief, Respondent stated "Pursuant to Rule 75 of the Ohio Rules of Civil Procedure, divorce, being a statutorily created procedure, provides no right to trial by jury."

On December 13, 1989, Petitioner filed his brief in response to Respondent's brief opposing jury trial. Petitioner cited the United States Constitution relevant to the

right of trial by jury, and he argued "if tested in the United States Supreme Court, Rule 75(C) would almost certainly be declared unconstitutional because it allows substantial awards of private property (much more than the $20.00 figure mentioned in the Bill of Rights) by the court without the parties having a right to trial by jury." Respondent did not reply.

On January 26, 1990, Petitioner filed his brief opposing summary judgment for Respondent. In his brief:

(a) Petitioner wrote "If Defendant is granted a summary judgment, Plaintiff intends to contest it, if necessary, all the way to the United States Supreme Court" and "The Seventh Amendment to the United States Constitution states, in part, '<u>In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved.</u>'", and Petitioner quoted Article VI(2) of the United States Constitution verbatim;

(b) Petitioner presented retionale and strong evidence (including fourteen exhibits, three of which were affidavits) that "there are many genuine issues of material fact in the case sub judice", and some of said strong evidence presented was:

(i) Petitioner's Exhibit C, an affidavit of grade school teacher Betty S. Root, which stated, in part, "I was present at a meeting with Charles Patterson and Amy Boland on June 28, 1988"....."the following events took place:

1. Amy refused to file a malpractice suit against the other lawyer (John Huber).

2. Amy told Charles that there's a one year limitation on a malpractice suit. She (Amy) admitted that she had not told him (Charles) this (one year limitation on filing legal malpractice suits) previously.

3. Amy acknowledged that she had known from the start that Charles was ex-

pecting her to try to get his money back either from the courts (via appeal) or file a malpractice suit.",

(ii) Petitioner's brief opposing summary judgment references Petitioner's request for admission 21, which requested Respondent to admit that "for a substantial period of time prior to the expiration date for Plaintiff to file a legal malpractice suit against John Huber, Defendant knew that Plaintiff wanted Defendant to file a legal malpractice suit against John Huber if that was necessary to recover the money that was unduly awarded to Plaintiff's ex-wife"; and when Respondent answered "Denied", Respondent was in conflict with Petitioner's Exhibit C, and that is certainly a genuine issue of material fact.,

(iii) Petitioner's Exhibits D, E, F, G, and H (an affidavit and portions of one deposition and portions of three filed court documents) contain evidence that; Respondent knew that John Huber had presented

insuffient evidence, during the trial, of a substantial amount of Petitioner's non-marital income that Respondent knew that John Huber had pre-trial knowledge of, and Respondent knew that the Court of Appeals of Greene County, Ohio, believed that evidence must be presented to the trial court in order to be considered in a fair and equitable division of property, and

(iv) Petitioner's brief opposing summary judgment references Petitioner's request for admission 22 which requested Respondent to admit that John Huber was negligent in failing to get on the trial record quantitative evidence of a large part of Petitioner's non-marital income that John Huber had knowledge of; and when Respondent answered "Denied", Respondent was in conflict with Petitioner's Exhibits D thru H, and that is certainly a genuine issue of material fact;

(c) Petitioner pointed out that Respondent still had not answered many of

Petitioner's interrogatories and many of Petitioner's requests for admission, even though Respondent had been ordered to answer both in the court's Journal Entry filed on October 3, 1989; and

(d) Petitioner pointed out that it is virtually impossible for a non-lawyer, pro se plaintiff, in a legal malpractice case, to get an attorney to testify against the attorney being sued, and therefore it is unreasonable to require a non-lawyer, pro se plaintiff to obtain legal expert testimony, and this contention was supported by:

(i) quoting a portion of page 273 of 14 American Jury Trials -- "Many lawyers refuse to appear, under any circumstances, as plaintiff's counsel in an action against another lawyer for damages for professional negligence.",

(ii) quoting a portion of a book written by lawyer/businessman Mark H. McCormack, titled The Terrible Truth About Lawyers (Library of Congress Catalog Card

Number: 87-11491) wherein Mr. McCormack wrote "Professional Courtesy... an absolutely central concept in the life of attorneys....is a system whereby lawyers make life easier for themselves and for each other, generally at the expense of their clients.", and

(iii) stating "Unless Defendant (Respondent) is a fortune teller (she did not use any discovery method), Defendant's Argument B ('Plaintiff is Unable to Provide Expert Testimony Necessary to Support a Malpractice Action') is, in effect, and implicit acknowledgment by Defendant of a terrible truth about attorneys; namely, that it is virtually impossible for a non-attorney, representing himself in a legal malpractice action, to get an attorney to testify against the attorney being sued."

On February 12, 1990, Respondent filed her reply brief in support of her motion for summary judgment. Respondent's reply brief did not challenge any of the exten-

sive hard evidence brought against her in Petitioner's response brief.

On March 20, 1990, the trial court filed a Journal Entry which failed to discuss any of the constitutional issues raised by Petitioner, sustained Respondent's motion for summary judgment, dismissed the case, found that Respondent had failed to answer Petitioner's interrogatories and request for admissions as required by the journal entry of October 3, 1989, and indicated the summary judgment would be set aside and the case would proceed either to a trial by jury or trial by court if Respondent failed to answer Petitioner's Interrogatories and request for admissions by April 3, 1990. The trial court cited only one case (and cited it incorrectly) Minick v. Callahan (1980) 24 Ohio 00 3d 104, in which a directed verdict was ordered because the plaintiff failed to provide legal expert testimony at trial. The trial court, in the case

sub judice, wrote "The Plaintiff does not have an expert witness to establish either malpractice by the Defendant or damage to the Plaintiff", and "Plaintiff has cited specific instances of Defendant's failure to act in Plaintiff's behalf. The specific claims of Plaintiff amount to allegations that Defendant failed to exercise requisite knowledge, skill and ability." In effect, the trial court said that, in a legal malpractice case, if defendant files a motion for summary judgment and, as evidence, provides only an affidavit of themself stating that they "exercised the requisite knowledge, skill and ability;" and pro se plaintiff does not provide an affidavit of a legal expert that supports plaintiff; that plaintiff is not entitled to present his case to a jury, regardless of how much hard evidence that plaintiff provides in his brief opposing summary judgment, relevant to the negligence of defendant. Not only is this unjust, it would deprive plaintiff

the opportunity of using Defendant as Plaintiff's expert witness and then cross-examing Defendant; attempting to rebut her testimony.

On April 3, 1990, Respondent finally provided answers to Petitioner's interrogatories and request for admissions.

On May 25, 1990, Petitioner filed his appeal brief in which:

(a) Petitioner quoted portions of Ohio Civil Rule 56 which indicate that summary judgment should only be awarded if there is no genuine issue as to any material fact, and Petitioner quoted a large body of case law to support this point;

(b) Petitioner stated "the trial court grossly abused its discretion by sustaining Defendant-Appellee's motion for summary judgment, thereby violating Plaintiff-Appellant's right to a jury trial, a right guaranteed by the Seventh Amendment to the United States Constitution (which says, in part, 'In Suits at common law,

where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved'). Article VI of the United States Constitution (which states, in part, 'The Constitution, and the Laws of the United States.....shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any state notwithstanding.') makes it clear that all judges in the United States are bound to honor the United States Constitution and all its amendments, including the Seventh Amendment.";

(c) Petitioner described some of the strong evidence that he had included in his brief opposing summary judgment which conflicted with the claim made by Respondent, in her affidavit, that both she and John Huber represented Petitioner "in a diligent careful and prudent manner and in such manner which conformed to the highest degree of legal care and professionalism.";

(d) Petitioner pointed out that Respondent's non-compliance with the October 3, 1989 court order to answer Petitioner's interrogatories and request for admissions must be considered willful because Respondent, an attorney acting pro se, prepared and filed a motion for summary judgment, a motion opposing Petitioner's right to jury trial, and a reply brief, all the while failing to answer, failing to file a motion for extension, and failing to file a motion for protective order; and therefore, it was an extreme abuse of discretion by the trial court to sustain Respondent's motion for summary judgment, when, based on Respondent's willful failure to answer and Petitioner's motion for all possible sanctions, the court could have deemed admitted the matters requested to be admitted and/or assumed interrogatory answers favorable to Petitioner and awarded summary judgment or default judgment to Petitioner, even though Petitioner did not

specifically move for summary judgment or default judgment; this contention was supported in Petitioner's appeal brief by a large body of case notes, some of which were Chess Music, Inc v. Bowman, 474 FSupp 184; Nationwide Insurance Co. v. Harvey, 50 OApp2d 361 (at fn 2), 4 003d 315, 363 NE2d 596; and Cine Forty-Second St Theatre v. Allied Artists, 602 F2d 1062;

(e) Petitioner said "It is pertinent to the case sub judice that, according to 31A American Jurisprudence 2d (1989) 49, Expert and Opinion Evidence, Section 40: 'While the testimony of witnesses having specialized education and training, or special experience and knowledge, is often admitted into evidence on the ground of necessity, a party is not necessarily required to resort to expert opinion testimony merely because the case involves matters of science, special skill, special learning, knowledge or experience which may be difficult for jurors to comprehend.' Hence,

Plaintiff-Appellant may not necessarily be required to resort to expert opinion testimony at the trial, and Plaintiff-Appellant certainly is not required to resort to expert opinion testimony before the trial. This point is supported by Laymon v. McComb, (524 FSupp 1091 [Colo]);" and

(f) Petitioner wrote "the trial court stated (in its Journal Entry, T.d.20, that granted summary judgment to Defendant-Appellee) 'The Plaintiff does not have an expert witness to establish either malpractice by the Defendant or damage to the Plaintiff.' The word 'establish' means 'to settle firmly.' No expert witness can settle firmly the malpractice of a party or the damage to a party. It is the duty of the trier of fact (which, in the case sub judice, should be a jury because a jury trial was timely demanded by Plaintiff-Appellant) to settle firmly the issues of fact."

On June 14, 1990, Respondent filed her

brief in the Court of Appeals. In her brief, Respondent cited Bloom v. Dieckmann, 11 Ohio App. 3d 202, 464 N.E.2d 187 (Ohio App. 1983), a legal malpractice case (stemming from a divorce case) in which the defendant filed a motion for summary judgment accompanied by his own affidavit as to the degree of care and professionalism he had used in rendering legal services, and when plaintiff produced his own affidavit, but did not produce a contrary "expert opinion" affidavit, defendant was awarded a summary judgment.

On June 21, Petitioner filed his reply brief which stated: "Bloom v. Dieckmann did not involve a demand for jury trial. In the case sub judice, Plaintiff-Appellant did demand a jury trial; therefore, the trial court's abuse of discretion was heinous because the trial court clearly knew, by virtue of Plaintiff-Appellant's briefs, that it (he, Roger B. Wilson) was violating Plaintiff-Appellant's Constitu-

tional right to a jury trial which is guaranteed by the revered Bill of Rights."

On December 28, 1990, the Court of Appeals of Greene County, Ohio, rendered their Opinion which:

(a) failed to discuss any of the constitutional issues raised by Petitioner;

(b) affirmed the summary judgment of the trial court;

(c) said that Petitioner "presented no evidentiary materials which support his claim" despite the fact Petitioner had presented, in his brief opposing summary judgment, a great deal of hard evidence which supported his complaint and showed that there were genuine issues of material fact; and

(d) stated that Petitioner "admits being unable to provide expert testimony supporting his claim" despite the fact that Petitioner made no such admission; in fact, in his brief opposing summary judgment, Petitioner stated that he "would continue

his search for an honest, reasonable and courageous attorney to be Plaintiff's expert witness"; the word "testimony" properly means evidence provided at trial; no trial, or hearing, occurred in this case.

On February 21, 1991, Petitioner filed his Memorandum in Support of Jurisdiction (in the Ohio S. Ct.) in which he:

(a) stated, in his "Proposition of Law", "If a trial court sustains, and a Court of Appeals affirms, Defendant's motion for summary judgment in the face of both a lawful demand for jury trial by Plaintiff and Plaintiff's timely evidence that there is one, or more than one, genuine issue of material fact, said court action is extremely unlawful because it is a violation of both the United States Constitution and Civil Rule 56", and he cited twelve authorities in support of his "Proposition of Law", including "Seventh Amendment to U.S. Constitution" and "Article VI of U.S. Constitution";

(b) pointed out that Respondent's affidavit, which the courts totally relied on in their attempt to justify summary judgment, lacked credibility because it stated "the legal services rendered to him (Petitioner) by me were done so in a diligent, careful and prudent manner which conformed to the highest degree of legal care and professionalism" despite Respondent's admissions that Petitioner's chances of a favorable decision were decreased by each of five or six of Respondent's failures to act on behalf of Petitioner;

(c) stated "This is untrue and is evidence of Court of Appeals' bias or incompetance" relevant to the Court of Appeals' statement that Petitioner presented no evidentiary materials to support his claim"; and

(d) Presented several examples of evidence he had timely provided to support his contention that there were genuine issues of material fact.

On May 15, 1991, The Supreme Court of Ohio, stating "for the reason that no substantial constitutional question exists therein", overruled Petitioner's motion.

ARGUMENT

Petitioner's constitutional right to a jury trial in this case (and the right of Ohio citizens to jury trial in divorce cases in which property valued at more than twenty dollars is in controversy) is supported by the following case law, which Petitioner cited in briefs to the Court of Appeals and the Ohio Supreme Court:

(a) "The right of jury trial in civil cases at common law, whether guaranteed by Constitution or provided by statute, should be jealously guarded by the courts., Jacob v. New York, 315 US 752, 62 S Ct 854"; and

(b) "The thrust of the Seventh Amendment is to preserve the right to jury trial as it exited in 1791., Parklane Hosiery Co. v. Shore, (1979) 439 US 322, 99 S Ct 645."

The obvious reason for the Seventh

Amendment is that, in 1791, many U.S. citizens did not trust judges. Petitioner, in 1991, does not trust Ohio judges. Ohio judges awarded, affirmed and condoned summary judgment to respondent. These judicial decisions are very unlawful because: there is no requirement in Ohio Civil Rule 56 to file expert witness counter-affidavits; an expert witness (divorce lawyer) counter-affidavit is almost impossible to get; Respondent's affidavit lacked credibility; Petitioner provided hard evidence of genuine issues of material fact; Petitioner was denied timely discovery; Petitioner lawfully demanded trial by jury; no trial occurred; and no hearing occurred.

Summary judgment rule case law supporting Petitioner's contention that Civil Rule 56 was unjustly applied in this case are as follows: Hollander v. Pan American World Airways, Inc., 382 FSupp 96 (expert counter-affidavits are not needed); United States ex rel. Jones v. Rundle, 453 F2d

147; and Erie Technological Products v. Centre Enginering, Inc., 52 FRD 524.

Of utmost importance is the question of whether it is constitutional for Ohio Civil Rule 75(C) to deny parties the right to trial by jury in divorce cases in which property valued at more than twenty dollars is in controversy. The Common Pleas Court of Cuyahoga County is the only court in Ohio to adopt Principles and Guidelines for the Division of Property in Actions for Divorce in Ohio, published in the Ohio State Bar Association Bulletin, March 16, 1981, p 491.

The Ohio Supreme Court decision, Cherry v. Cherry, 66 Ohio St. 2d 348, 421 N.E. 2d 1293 (1981), stated, in part, "A trial court has broad discretion as to division of property upon divorce" and "flat rules have no place in determining a property division." Thus, most Ohio divorce courts have virtually absolute power to settle a great many property disputes,

despite the Seventh Amendment which was adopted because many citizens distrusted judges. To illustrate the extreme injustice in Ohio divorce courts, the following is a sample of the "Ohio style justice" Petitioner received in his 1986 divorce case (from which this malpractice case stems) involving a three year marriage:

(a) the divorce court treated a great deal of Petitioner's non-marital property as marital property despite evidence on the trial record and a Motion For a New Trial, Reconsideration or Relief From Judgment which informed the divorce court of these errors (examples of this are the sale of a mare for $12,000 one month prior to the marriage, the money being received by Petitioner one month after the start of the marriage, and the return of a $5,250 stud fee shortly after the marriage began which Petitioner had paid before the marriage);

(b) the divorce court treated a substantial amount of the marital property of

Petitioner's ex-wife as non-marital property (such as the increased equity in her house, which was on the trial record);

(c) the divorce court awarded Petitioner's ex-wife more than 75% of the property it deemed marital;

(d) the divorce court Findings of Fact unjustly challenged Petitioner's credibility which had not been an issue during the trial and hearing, while making no mention of the numerous false information provided under oath by Petitioner's ex-wife (information, such as salary, that would have benefited her financially if not challenged by Petitioner) despite the fact that credibility of Petitioner's ex-wife was a major issue at the trial;

(e) the Court of Appeals' Opinion indicated that because Petitioner requested findings of fact and conclusions of law from the divorce court, Petitioner should have to pay substantial additional alimony to his ex-wife;

(f) the Court of Appeals' Opinion indicated that it was okay for a divorce court to award property without establishing (or trying to establish) its value;

(g) the Court of Appeals' Opinion failed to address the issue of tracing non-marital assets, such as the $12,000 and $5,250 mentioned above in (a), thereby effectively denying Petitioner his right to appeal;

(h) the Court of Appeals' Opinion concurred with non-existant divorce court findings; and

(i) the Court of Appeals' Opinion indicated the divorce court award of a high percentage of the property it deemed marital to Petitioner's ex-wife was justified by Martin v Martin, a case in which the divorce court awarded Mrs. Martin less than 40% of the marital property despite the fact that the fourteen year marriage had resulted in a severely handicapped child that the parties stipulated Mrs.

Martin would retain custody of.

Justice Oliver Wendell Holmes, Jr. observed that, stripped to the essentials, the law is simply a prediction of how judges will decide cases. Based on this observation, some Ohio divorce courts and appeal courts are virtually lawless.

Respectfully submitted,

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IN THE COURT OF APPEALS OF
GREENE COUNTY, OHIO

CHARLES F. PATTERSON:

Plaintiff-Appellant: CASE NO. 90-CA-44

vs. : C.P. NO.88-CV-0406

AMY S. BOLAND :

Defendant-Appellee :

.....

O P I N I O N

Appeal considered on the 27th day of November, 1990. Opinion rendered on the 28th day of December, 1990 (Final Entry, pursuant to this Opinion was "Mailed to Clerk's Office on January 18, 1991" and file-stamped on January 22, 1991)

Charles F. Patterson, 1767 Stewart Road,
Xenia, Ohio 45385
Plaintiff-Appellant, Pro Se

Amy S. Boland, 45 W. Franklin Street,
Bellbrook, Ohio 45305
Defendant-Appellee, Pro Se

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GRADY, J.,

This appeal is taken from a summary

judgment granted in favor of Appellee, an attorney at law, in a legal malpractice action. The Appellant argues that genuine issues of material fact remain for determination and, therefore, Appellee is not entitled to summary judgment. For the reasons set forth below, we will overrule the alleged error and affirm the judgment of the trial court.

I

FACTUAL POSTURE

In 1987, Appellant Patterson retained Appellee Boland to represent him in matters related to his divorce decree. These matters included a prior appeal to this court and an attempted appeal to the Ohio Supreme Court, which was denied. Appellant then filed a complaint against Boland alleging failures in her representation of him in these matters.

After Boland's answer was filed,

Patterson presented interrogatories on January 3, 1989. Boland filed answers and objections on February 2, 1989. Patterson, apparently unsatisfied with these answers and objections, filed a motion to compel on February 14, 1989. Requests for admissions filed by Patterson on April 24, 1989 were answered and objected to on May 26, 1989. Patterson again filed a motion to compel.

Boland moved for summary judgment, citing failure to present expert testimony to support the alleged failure to perform according to the appropriate standard of care. Appellee supported her motion by attaching her own affidavit stating that she performed the legal services requested and did so with the highest degree of care and professionalism.

Patterson's responsive pleading realleges numerous shortcomings in

Boland's representation of him. Patterson did not, however, complete his own affidavit or attach an affidavit of an expert witness.

The trial court granted Boland's motion for summary judgment, stating that expert testimony was necessary to establish the appropriate standard of care. Further, the trial court ordered Boland to comply with its previous orders regarding interrogatories and requests for admissions set forth by Patterson.

Appellant Patterson sets out a sole assignment of error stating:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN SUSTAINING DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

Civ. R. 56(C) states, in part:

> Summary judgment shall be

rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary

judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

Pursuant to Civ. R. 56(C), the burden of proving that there exists no genuine issue of material fact lies with the movant. See, Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St. 2d 64. A non-moving party bears no burden to resist or oppose a motion for summary judgment. However, upon movant's presentation of evidence sufficient to meet his burden, "the non-moving party assumes a burden of rebuttal to supply evidentiary materials supporting his position, when the moving party presents evidentiary materials which deny that claim." Whiteleather v. Yosowitz (1983), 10 Ohio App. 3d 272, 275. In other words, a non-movant must set forth specific evidence

rebutting the movant's contention that no genuine issue of material fact exists.

In his complaint Patterson alleges that Boland failed to exercise the requisite knowledge, skill, and ability possessed and exercised by members of the legal community similarly situated. In her motion for summary judgment, Boland presented her affidavit establishing that she performed the required services and did so with the appropriate degree of care. At that point, Patterson assumed the burden of rebuttal to supply evidentiary materials supporting his claim.

In Bloom v. Diekmann (1983), 11 Ohio App. 3d 202, 464 N.E.2d 187, the Court of Appeals for Hamilton County held in its syllabus:

> Expert evidence is required in a legal malpractice action to establish the attorney's breach

> of duty of care except in actions where the breach or lack thereof is so obvious that it may be determined by the court as a matter of law, or is within the ordinary knowledge and experience of laymen.

See also, Minick v. Callahan (1980), 24 Ohio Ops. 3d 104, Gibbons v. Price (1986), 33 Ohio App. 3d 4.

In response to Boland's motion for summary judgment Patterson admits being unable to provide expert testimony supporting his claim, arguing that attorneys purposely refrain from testifying against other attorneys out of "professional courtesy". Our review of the record reveals that Patterson failed to satisfy his burden of rebuttal, as he has presented no evidentiary materials which support his claim.

We turn now to the question of whether the trial court abused its discretion by granting summary judgment prior to the completion of discovery.

In Ohio, the trial court has broad discretion in controlling the discovery process. State, ex rel. Daggett v. Gessaman (1973), 34 Ohio St. 2d 55, 63, Ohio Ops. 2d 88, 295 N.E.2d 659.

Though incomplete discovery suggests that a party may yet be able to substantiate factual issues, a per se rule that summary judgment may not be granted when discovery is outstanding is not appropriate. In any such case the party denied discovery has the burden to show how the denial may prejudice his ability to prosecute or defend. See Bright, et al. v. Ford Motor Co., et al. (August 29, 1990), Mont. App. No. 11883, unreported, Grady, J., dissenting. Patterson has not

met that burden. In the absence of such a showing we must favor the presumption that the trial court has acted correctly.

Finding no abuse of discretion by the trial court, Appellant's assignment of error is overruled. The judgment of the trial court will be affirmed.

WOLFF, P.J., and WILSON, J., concur

THE SUPREME COURT OF OHIO

1991 TERM

To wit: May 15, 1991

Charles F. Patterson, :
Appellant, : Case No. 91-400

v. : E N T R Y

Amy S. Boland, :
Appellee. :

Upon consideration of the motion for an order directing the Court of Appeals for Greene County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Charles F. Patterson.

(Court of Appeals No. 90CA44)

Signed by THOMAS J. MOYER
Chief Justice

IN THE COURT OF COMMON PLEAS,
GREENE COUNTY, OHIO

CHARLES F. PATTERSON,

Plaintiff, * Case No. #88CV-0406

-vs- * Journal Entry
(Filed March 20, 1990)

AMY S. BOLAND, *

Defendant. *

* * * * * * * * * * *

This case was considered by the Court on the Plaintiff's motion for order of sanctions against Defendant for failure to comply with Court rulings (sic, should have comma) on Defendant's motion for summary judgment, and on Defendant's memorandum in opposition to Plaintiff's request for jury trial.

The Court finds that the Defendant has failed to answer Plaintiff's interrogatories. Such answer was required by the Court's journal entry file stamped October 3, 1989. The Court finds that Defendant

has also failed to answer the request for admissions as required by the Court's journal entry of October 3, 1989. The Court issues this current order compelling the Defendant to supply answers. Failure to file such answers on or before April 3, 1990, will cause the Court to consider additional sanctions. The question of award of attorney fees to Plaintiff and costs for failure to timely file remains pending.

Applying the standards set forth in Civil Rule 56, the Defendant's motion for summary judgment is sustained, and Plaintiff's case is dismissed. The Court finds that Plaintiff alleges malpractice gainst (sic) Defendant for her negligence in representing the Defendant (sic, should be Plaintiff) in the appeal process and related matters. Plaintiff's complaint lists several grounds for this complaint.

The Plaintiff does not have an expert witness to establish either malpractice by the Defendant or damage to the Plaintiff.

Minick v. Callahan (1980) 14 (sic, should be 24) Ohio 00 3d 104 holds that, "In order to establish a claim of legal malpractice based on an alleged failure to exercise the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession similarly situated, expert testimony is necessary to establish such standards."

Minick was based on a directed verdict situation, but the same rationale applies in the current summary judgment situation.

Plaintiff has cited specific instances of Defendant's failure to act in Plaintiff's behalf. The specific claims of Plaintiff amount to allegations that

Defendant failed to exercise the requisite knowledge, skill and ability.

If Defendant fails to timely file the answers to interrogatories and the admissions or denials required above, this summary judgment will be set aside, and the case will proceed to trial (either to a jury or to the Court).

A journal entry will be issied (sic) by the Court on April 3, 1990.

Signed by ROGER B. WILSON
JUDGE

IN THE COURT OF COMMON PLEAS,
GREENE COUNTY, OHIO

CHARLES F. PATTERSON,

Plaintiff, * Case No. 88CV0406

vs. *

AMY S. BOLAND, *

Defendant * Journal Entry
(filed on October 3, 1989)

* * * * * * * *

Attorneys conference was held in Xenia on September 25, 1989. Plaintiff appeared represented himself and the Defendant appeared representing herself.

Plaintiff asked the court to rule on the two pending motions by Plaintiff. The motion to compel answer to interrogatories was filed February 14 and the motion to compel answers to requests for admissions was filed June 27.

The Defendant asked the Court to authorize the filing of a motion for summary judgment and to schedule related

matters.

The Court stated that the motions would be ruled upon by Friday, September 29 and the ruling would be mailed on that date to the Office of Judge Reid and thereafter to each of the parties.

Each party is given until on or before November 27, 1989, to file with the Clerk a motion for summary judgment with appropriate attachments. Each side is given until on or before January 29, 1990, to file a response to any such motion. Each side is given until on or before February 12, 1990, to file reply. Thereafter, the Court will decide the motion.

Plaintiff expects to have three witnesses for trial, and Defendant expects to have three or four witnesses.

Defendant expects to file a motion concerning the right of jury trial in

this matter. Such motion shall be filed on the same schedule as the motion for summary judgment, and the Court will decide thereafter.

Trial is scheduled for Monday, April 30 and Tuesday, May 1, 1990, at 9:00 a.m. If it is a jury trial it will be for two days. If it is a court trial,it will be for one day.

In response to the pending motions, the Court sustains Plaintiff's motion filed June 27. Defendant shall answer the requests for admission sought by Plaintiff. The Court believes that the requests are able to be answered by either an admission or a denial.

Defendant's objections to the interrogatories are overruled, and Defendant shall answer the interrogatories. The Court believes that virtually all the interrogatories are (sic) objected to by Defen-

dant are susceptible to a yes or a no answer.

The Court declines to strike any defenses that may have been raised by the Defendant.

In making the rulings, the Court is not ruling on the admissibility of any information obtained through the discovery process.

Signed by ROGER B. WILSON
JUDGE

IN THE COURT OF COMMON PLEAS,
GREENE COUNTY, OHIO

CHARLES F. PATTERSON,

Plaintiff, * Case No. 88CV-0406

vs. * Visiting Judge Wilson

AMY S. BOLAND, *

Defendant * Journal Entry
(filed on May 25, 1990)

* * * * * * *

The Court's Journal Entry of either March 20 or March 21, 1990, dismissed the case and required Defendant to file answers to interrogatories and requests for admissions. The question of award of attorney fees and court costs for failure to timely file was also left pending.

The Court finds that Defendant filed appropriate responses on April 3, 1990.

No attorney fees are awarded to Plaintiff. Defendant shall pay the court costs for this journal entry and the court costs for the motion to compel and result-

ing filings in relation to that motion.

The Clerk shall send a copy of this journal entry to the Plaintiff and to the Defendant.

Signed by ROGER B. WILSON
JUDGE

RULE 37. Failure to make discovery: sanctions

(B) Failure to comply with order.

(1) If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of that court.

(2) If any party or an officer, director, or managing agent of a party or a person designated under Rule 30(B)(5) or Rule 31(A) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (A) of this rule and Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action

in accordance with the claim of the party obtaining the order;

(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(e) Where a party has failed to comply with an order under Rule 35(A) requiring him to produce another for examination,

such orders as are listed in subsections (a), (b), and (c) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make the award of expenses unjust.

RULE 56. Summary judgment

(C) Motion and proceedings thereon.

The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary

judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(G) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

RULE 75. Divorce, annulment and alimony action

(A) Applicability. These Rules of Civil Procedure shall apply in actions for divorce, annulment, alimony and related proceedings, with the modifications or exceptions set forth in this rule.

(C) Trial by court or referee. In proceedings under this rule there shall be no right to trial by jury. All issues may be heard either by the court or by a referee as the court may, on the request of any party or on its own motion, direct. Rule 53 shall apply to all cases or issues directed to be heard by a referee.

Constitutionality of Relevant Ohio Law

In this Petition, the constitutionality of Ohio law has been drawn into question [Ohio Revised Code Civil Rule 75(c) and, possibly, Civil Rule 56]. Therefore, 28 U.S.C. § 2403 (b) may be applicable.